BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported at 125 F. (2d) 752.

STATEMENT OF JURISDICTION.[1]

A statement of the grounds upon which the jurisdiction of this Court is invoked appears in the petition herein, page 6.

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[1] In accordance with Rule 35 (4) of the Circuit Court of Appeals for the Seventh Circuit, the complete record is *not* printed, but each party prints as a separate Appendix to his brief, such parts of the record material to the issues that he desires the Court to read. Hence the record as printed below appears in the Board's Appendix and Respondent's (Petitioners before this Court) Appendix, and together with the proceedings in the Circuit Court of Appeals is presented here in accordance with Rule 38 (7) of this Court as "the record as printed below."

References are as follows:

"B.A." refers to Board's Appendix.

"Rp.A." refers to Respondents' Appendix.

"Board" refers to the National Labor Relations Board.

"Union" refers to the International Printing, Pressmen & Assistants Union, Box and Carton Local 415 A.F. of L.

All italics herein are supplied, except where otherwise specially noted.

STATEMENT OF THE CASE.

Facts.

The opinion of the Circuit Court of Appeals states at the outset:

> "Except as to some relatively minor matters, there is little, if any, conflict as to the facts. The Board's decision is therefore predicated largely upon inferences and conclusions, some of which are legal rather than factual, which it draws from, and places upon, certain acts of the respondents.
>
> "The controversy revolves largely around (1) a speech made by respondents' attorney, Jacobson, on August 5, 1939, to the employees who were assembled in the plant for such purpose, (2) the distribution by respondents and the execution of individual employment contracts with their employees for the year 1939, renewed for the year 1940, and again renewed for the year 1941, (3) an interview by respondents' attorney with all of respondents' employees on March 15, 1940, while there was pending before the Board a representation proceeding, and (4) a letter mailed by respondents to all of their employees on May 3, 1940."

Petitioners are three brothers engaged in the manufacture and sale of corrugated paper boxes and products (Rp. A. 72). All three act primarily as salesmen and have nothing to do directly with the production end of the business (Rp. A. 73). The business was organized in 1926 employing between 10 to 15 persons; by January of 1939 the number had increased to from 65 to 70 employees, at which time Petitioners began the construction of a new plant (Rp. A. 73, 74). In July and August, 1939, Petitioners transferred their operations to their new plant (Rp. A. 86). A great deal of new machinery was installed in the new plant which

necessitated the employment of more than 50 new experienced employees from other plants (Rp. A. 74, 87; B. A. 129, 130, 132, 133).

There was union activity among Petitioners' employees beginning in late 1938 or early 1939 (Rp. A. 74, 87, 17, 24).

In August, 1939, after moving to the new plant, Petitioners' employees spent a great deal of time during working hours away from their machines, arguing the question of unionization (Rp. A. 66, 67, 70, 71, 75, 74, 87; B. A. 130). The constant strife resulted in friends becoming enemies and near fist fights in the plant (Rp. A. 66, 67, 75).

Employees freely discussed the question of unionization during working hours (Rp. A. 66, 67, 75, 74, 87, 23, 25). Petitioners at no time prohibited such discussion and all their foremen were specifically instructed to in no way interfere and did in no way interfere with such activities (Rp. A. 17, 24, 87). No employee made any secret of his union affiliation or activities (Rp. A. 8, 20, 24, 26, 38, 39, 2, 69, 87).

There is no complaint here that any employee was ever at any time discriminated against, laid off or discharged because of union activity or union membership (Rp. A. 11, 12, 19, 20, 23, 25, 34, 35, 39, 66, 67, 75, 74, 87, 92, 93; B. A. 130).

Many employees, in a turmoil as to their rights under the National Labor Relations Act, made inquiry of Petitioners as to their position, inquiring whether they would be fired if they did or did not join a union; whether they could be forced to join a union, or whether it was necessary to join a union in order to insure their jobs (B. A. 130; Rp. A. 78, 91, 75, 76).

Therefore, in July, 1939, before any union demands for recognition, Petitioners sought advice and employed the

law firm of Jacobson, Merrick, Nierman & Silbert, and discussed with their counsel the problem of alleviating the fears and questions of their employees (Rp. A. 82, 89, 78, 77; B. A. 130, 139, 140).

Speech of August 5, 1939.

Accordingly, on the afternoon of August 5, 1939, Petitioners called a meeting at the new plant of all of their employees for the purpose of having the National Labor Relations Act explained by someone familiar with the Act (Rp. A. 78, 77, 89; B. A. 130).

Lewis F. Jacobson, one of the attorneys for Petitioners, addressed the meeting. The entire National Labor Relations Act was read and explained to all of the employees (Rp. A. 16, 35, 37, 64, 70, 71, 88; B. A. 84). In the course of the speech, all employees were told the following:

(a) Any employee was free to join any union and would not be fired or discriminated against for so doing (Rp. A. 14, 17, 30, 37, 64, 70, 71, 88).

(b) All Petitioners were interested in was that the employees should know their rights (Rp. A. 17, 24, 55, 70, 71, 88).

(c) Petitioners wanted to treat all employees right (B. A. 84).

(d) The employees' choice could be freely exercised (Rp. A. 6, 7, 16, 17, 35, 37, 38, 52; B. A. 84).

At the close of the speech, it was announced that vacations with pay were being given (B. A. 14), and that to facilitate arranging vacation schedules for that year, employees were being asked to appoint monitors for each department who would make up the schedules in accordance with seniority and the convenience of individual employees (Rp. A. 30, 36, 37, 88; B. A. 138, 140).

The employees understood that the sole purpose of Jacobson's speech was to explain to them their rights (Rp. A. 17, 35, 37); employees joined the Union after the speech (Rp. A. 34, 35); no employee considered the monitors as collective bargaining (Rp. A. 30, 22, 23, 27, 65, 88; B. A. 140); the employees understood that the sole purpose of the monitors was to arrange a vacation schedule (Rp. A. 30, 36, 37, 88). Petitioners at no time engaged in any bargaining whatsoever or adjustment of grievances with monitors acting as representatives (Rp. A. 88). Jacobson made no proposals in his speech (Rp. A. 6, 7, 16, 17, 37, 38, 52). No employee abandoned the Union as a result of the speech (Rp. A. 6, 24, 25); employees continued to be as active as they wanted to be (Rp. A. 23, 25); ten months after Jacobson's speech the Union still claimed that it represented a majority of Petitioners' employees (Rp. A. 108, 110).

The Individual Contracts.

About a week after Jacobson's speech of August 5, 1939, employees were offered an individual contract which expired by its terms on December 31, 1939 (Rp. A. 88; B. A. 150). An 8% increase in wages was given to all employees on October 9, 1939 (B. A. 158). The receipt of these benefits was in no way contingent upon the execution of an individual contract (Rp. A. 8, 20, 88, 90).

A. The 1939 Individual Contract.

These 1939 contracts were merely handed out and the employees told at the time that they could sign or not sign the contract as they wished, and those who did sign the contract did so voluntarily (Rp. A. 7, 9, 10, 14, 16, 17, 19, 24, 26, 31, 40, 43, 55, 58, 59, 60, 63, 90, 91, 70, 71). Forty-seven of the 152 employees working at that time did not accept the offered 1939 contract and were in no way discriminated against (Rp. A. 9, 10, 19, 40, 26; B. A. 159)

B. The 1940 Individual Contract.

On December 18, 1939, an individual contract for the year 1940 was mailed to each employee's home, together with a letter stating (Rp. 104, 75, 60, 72):

> "As you know, your contract of employment with us expires December 31, 1939. We are happy to submit to you for your consideration a new contract for the year 1940.
>
> "Please be assured that we do not wish to influence you in the least as to whether or not you should sign this contract.
>
> "Should you desire to sign, please sign both copies and return in the self addressed envelope enclosed herewith within three days, if convenient. Upon approval by the company your copy will be signed and immediately returned to you. If you desire any further information or have any questions, please contact Mr. Snyder."

One hundred forty-four out of the 163 employees then employed accepted the offer and executed and returned to Petitioners an individual contract for the year 1940, between December 18, 1939 and February 21, 1940 (B. A. 160). No employee who did not accept a contract was in any way criticized or discriminated against for not signing a contract, and except for the letter of transmittal, no employee was ever asked to accept an individual contract after having once been offered the same through the letter (Rp. A. 9, 24, 43, 58, 59, 60, 63, 64, 91). This contract expired by its terms on December 31, 1940 (B. A. 153).

C. The 1941 Individual Contract.

In the month of December, 1940, each employee of Petitioners was given a copy of an individual contract for the year 1941 by a clerk, in a sealed envelope, without

any recommendation from Petitioners as to whether or not they should accept the offer of said contract (Rp. A. 54, 55, 10, 28, 31, 64, 70, 71; B. A. 81, 91, 99).

Of the 201 employees then employed by the Petitioners, only 45 employees accepted the individual contract and executed the same between January 5, 1941 and January 31, 1941 (B. A. 161).

Sixty-one of the 152 employees who were working for Petitioners in August of 1939, at the time of the offer of the individual contract for the year 1939, were no longer employed by Petitioners at the time of the offer of the 1941 contract (B. A. 128). No employee was in any manner, at any time, approached by Petitioners or any foremen regarding the execution or the non-acceptance of the offered 1941 individual contract (Rp. A. 54, 55, 19, 60, 64, 70, 71).

D. Employees' Understanding of the Individual Contract.

(1) All employees, including those who were union members, who accepted any one of the offered individual contracts, were told and knew that they could accept the individual contract and still join or continue to belong to a union, or do either, or neither (Rp. A. 11, 14, 17, 23, 31, 38, 45, 55, 65, 70, 71).

(2) Many employees accepted an individual contract one year and did not do so in another year (Resp. Ex. 6 and 7, Rp. A. 105, 107, 28).

(3) Employees who did accept an individual contract did so without any regard for the wishes or desires of the Petitioners (Rp. A. 46, 16, 9, 28, 55, 51, 63, 70, 71; B. A. 84, 86); such employees merely followed their own personal likes and dislikes on the subject (Rp. A. 28, 31).

(4) It was stipulated that the individual contract was not a term or condition of employment (Rp. A. 75).

(5) The Union discussed the individual contracts at its union meetings in August, 1939, and informed its members that the individual contracts meant nothing (Rp. A. 3, 4, 5, 16; B. A. 94). Before signing the 1939 contract, employees asked the Union's advice (Rp. A. 16). The Union informed all the employees in the plant by letter that there *was nothing* "in these contracts that said you (employees) did not have the right under the law to vote for any organization you wished to represent you in collective bargaining" (Board's Ex. 3, B. A. 147, 70, 71).

(6) The Union, although cognizant since August, 1939, of the existence of the offered individual contract and its acceptance by some of the employees, at no time made any complaint regarding the individual contract, until seventeen months later on January 7, 1941 (Rp. A. 3, 4, 5, 99, 100).

(7) The National Labor Relations Board, in case No. XIII, R. 353, involving the same parties, on April 11, 1940, made the following Decision (Resp. Ex. 8, Rp. A. 111):

> "We find that such individual contracts did not constitute a bar to the present proceedings. The fact that an employee signs an individual employment contract cannot be held to reflect the desires of such an employee regarding representation and does not constitute a bar to collective bargaining on his behalf.
>
> "We find that the question concerning representation which has arisen, can best be solved by an election by secret ballot. * * *"

And the National Labor Relations Board, in the same case, also known as case No. R. 1768, entered a Supplemental Decision overruling the Union's objections to the election (Resp. Ex. 9, Rp. A. 114).

Adjustment Clause.

Each individual contract contained an adjustment clause stating that (B. A. 150):

> "the Company will endeavor to adjust with the Employee all complaints and disputes by negotiation, if possible. If it cannot be so adjusted the Employee hereby selects ..... as his representative and arbitrator, and the Company selects its superintendent as its representative, and they shall promptly hear and adjust all such complaints, or failing to do so, shall select a third disinterested arbitrator, which three shall promptly hear, adjust and arbitrate every such complaint or dispute. The decision of the majority of such Board to be final upon both Employee and Employer."

(a) All employees understood that they had the right to use or not use the adjustment clause, and that they could name any person inside or outside the plant, or any organization, union or otherwise, as their arbitrator under this clause (Rp. A. 10, 14, 17, 20, 31, 64, 44, 45, 49, 52, 55, 70, 71).

(b) The employees understood that if they did not designate any arbitrator they were accepting the individual contract exclusive of the adjustment clause (Rp. A. 17, 11; B. A. 115).

(c) In 1939, of the 107 (out of 152 persons then employed) who did accept an individual contract, 20 did not choose to accept or use this clause and did not designate any arbitrator; 24 designated themselves and 63 designated others (Rp. Exs. 3, 6, 7; B. A. 159; Rp. A. 105-107).

(d) Of the 144 employees who did accept an individual contract for the year 1940, 124 chose not to accept this clause by not designating any arbitrator, while 9 em-

ployees designated themselves and 11 employees designated others (Rp. Exs. 4, 6, 7; B. A. 160; Rp. A. 105-107).

(e) Of the 45 employees out of 201, who accepted an individual contract for the year 1941, 37 did not accept this clause and did not designate any arbitrator, 6 designated themselves and 2 designated others as arbitrator (Rp. Exs. 5, 6, 7, B. A. 161; Rp. A. 105-107).

(f) Petitioners in no way interfered with the employees' freedom of choice in determining: (1) who the employees might designate, or (2) whether the employee should accept or reject this clause (Rp. A. 14, 11, 20, 9, 10, 17, 31, 55, 64, 70, 71).

Interviewing of Petitioners' Employees.

In March, 1940, after the Board had ordered an investigation into the question of representation of Petitioners' employees, David Silbert and Robert B. Shapiro, attorneys for the Petitioners, interviewed all of Petitioners' employees (B. A. 135, 141). Similar interviews had been made by said attorneys in other plants, many of which plants had collective bargaining contracts with different unions (Rp. A. 95). The purpose of these interviews by these attorneys was to investigate certain facts in issue in preparation for the Board's representation hearing (Rp. A. 95, 96). Petitioners desired to determine by these interviews whether the union claim that it had a "substantial interest" and represented an uncoerced majority of Petitioners' employees was true, so as to entitle it to have the Board order an election (Rp. A. 85, 86, 96). The Union had previously denied the request of Petitioners' attorneys to check the union application cards for authenticity of signature (Rp. A. 83, 84, 94). Furthermore, Petitioners wanted to avail themselves of the opportunity afforded by these interviews to determine for themselves

whether their employees had any remediable grievances or complaints, inasmuch as they personally had no direct contact with the production end of the business (Rp. A. 13, 18, 28, 29, 69, 70, 71; B. A. 141).

In the course of the interviews, each of the employees was told:

(1) That no employee had to answer any of the questions if he did not care to do so; that the employees were at liberty to stay or not to stay in the conference, and were perfectly free to return to their work if they chose (Rp. A. 15, 27, 29, 36, 69, 70, 71, 94, 95).

(2) That the interviewer was an attorney employed by the Company to interview the employees as the interviewer had done in other plants; that Petitioners' plant was too small to enable them to employ a personnel man, and that therefore this method of interviewing was being used to determine whether there were any grievances or suggestions that the employees wished to inform Petitioners about; that Petitioners would be glad to accept any suggestions to improve the operation of the plant, particularly in view of the fact that they had so recently moved to the new plant (Rp. A. 13, 28, 29, 69; B. A. 141, 142).

(3) That the purpose of the interview was not to sell them the idea of the individual contract, or discuss with them the merits of unionization (Rp. A. 94; B. A. 143).

(4) That in order to determine whether the Union had a "substantial interest" to entitle it to have an election among Petitioners' employees, Petitioners' attorneys had asked the Union for an opportunity to check their application cards for authenticity of signatures, and that this request had been refused; that therefore, in view of this refusal by the Union, it was decided to ask the employees directly whether or not they were members of any labor

organization (Rp. A. 95); that if they cared to answer this question they could, but that they did not have to answer it; that the Company, in asking this question, did not care whether they belonged to a union or not; that they had complete freedom of choice under the law to join or not join a union; that if a majority of the employees desired a union, the Company would be glad to recognize any labor organization they chose (Rp. A. 8, 13, 20, 29, 37, 38, 15, 69, 91, 92, 94, 70, 71; B. A. 92); that on the question of unionization, the Company would remain neutral (Rp. A. 48, 94).

(5) That the employees had a right to belong to the Union, and that it made no difference to the Company (Rp. A. 8, 13, 20, 32, 37, 38, 92, 94).

The employees were also asked if they had signed an individual contract for that year and the year previous, and if they had any questions they wished to ask about the contracts (Rp. A. 13, 14, 29; B. A. 143).

These interviews with employees occurred seven weeks prior to the election and before an election was ordered by the Board, and nothing was said, directly or indirectly, about how the employees should vote (Rp. A. 20, 32, 48).

All the employees testified and the Board so found that their right of free choice with reference to the election, subsequently held by the Board, was in no way interfered with by any activity of Petitioners (Rp. A. 11, 16, 32, 47, 50, 58, 65, 70, 71).

Election of May 8, 1940.

On February 16, 1940, the Union filed an amended petition under oath with the Board alleging that it represented a majority of Petitioners' employees for the purpose of collective bargaining and requested that the Board investi-

gate and certify it to be the appropriate collective bargaining unit (Rp. A. 108).

On March 9, 1940, the Regional Director of the Board issued a notice of hearing, which was served on Petitioners on March 13, 1940, directing that an investigation of the question of representation be held and a hearing be held on March 21, 1940, to determine whether or not the Union had a substantial interest, and that, if such were the case, an election be directed among Petitioners' employees (Rp. A. 108).

Thereafter, on April 11, 1940, the Board ordered an election among Petitioners' employees, and pursuant thereto, an election was held on May 8, 1940 (Rp. A. 113).

In this election, of the 173 employees eligible to vote, 59 voted for the Union and 101 voted against the Union (Rp. A. 113).

On June 12, 1940, the Union filed objections to the election, which objections were investigated by the Regional Director of the Board. On June 20, 1940, the Regional Director issued a report on objections to the election report. On July 2, 1940, the Board found that no collective bargaining representative had been selected by a majority of Petitioners' employees, overruled the Union's objections and sustained the validity of the election and the self-determination of Petitioners' employees that they did not desire to be represented by the Union (Rp. A. 114).

At this time the Union and the Board had knowledge of:

(a) The individual contracts executed for the years 1939 and 1940 (Rp. A. 3, 4, 83, 111);

(b) The interviewing of Petitioners' employees by their attorneys in March, 1940 (Rp. A. 96);

(c) The speech made to the employees on August 5, 1939 (Rp. A. 4, 5).

(d) A letter of May 3, 1940, sent by Petitioners to all their employees (Rp. A. 5; B. A. 76).

The Union, in its objections to the election made no complaint about (a), (b), (c), or (d). These were the points raised before the Circuit Court of Appeals.

Letters to Employees from Union and Petitioners.

In addition to the various union meetings, the Union sent to all of Petitioners' employees two letters dated April 24, 1940 (Board's Ex. 2; B. A. 145) and May 1, 1940 (Board's Ex. 3; B. A. 146). The Union had a list of all the names and addresses of Petitioners' employees (B. A. 70, 71). In the Union letters employees were told, among other things:

(a) "Don't be misled by any rumors that may be circulated. You know and realize that the company has opposed the union" (B. A. 145).

(b) "You have a perfect right to talk this matter over as much as you wish" (B. A. 146).

(c) "* * * If you feel that you are an American citizen and believe you have the same right to become organized as the boss, then you will vote 'for the union'" (B. A. 146).

(d) "* * * The Company has brought to bear all the forces at its command to try to defeat the movement" (Union) (B. A. 146).

(e) "The next move was to get the employees to sign individual contracts, contracts which guarantee the employees absolutely nothing * * *" (B. A. 146).

(f) There is nothing *"in these contracts that said you did not have the right under the law to vote for any organization you wished to represent you in collective bargaining"* (italics added) (B. A. 147).

(g) "The law says that a person has a right to join any union of their own choosing and the employer must not interfere in any way" (B. A. 147).

(h) "At this election each and every employee in the production departments * * * will be permitted to cast a secret ballot to express their own wish" (B. A. 147).

(i) "If the union receives 51% of the ballots cast then the union is recognized and certified by the National Labor Relations Board as the sole bargaining agent and have the right to negotiate with the company for wages, hours and working conditions" (B. A. 147).

(j) "* * * when the union bargains with the company * * * it will not be for the kind of contract that the firm offered you" (B. A. 147).

(k) "Don't forget the old slogan 'In union there is strength'" (B. A. 148).

On May 3, 1940, the Petitioners wrote a letter to their employees stating, among other things:

(a) "Many of our employees have come to us with two letters, dated April 24th and May 1st, 1940, signed by union organizers, and have asked us what those letters are all about (B. A. 156).

(b) "What is the truth about the contents of these letters and of the agitation created by these union organizers? Are the letters that you have received and the arguments that you have heard from these people for your benefit? (B. A. 156).

(c) "*We want you to know that every employee has the right to join or to not join a labor organization.* Nothing in this letter contained is intended to in any manner interfere with that right, and we do not intend

by this letter to influence you one way or the other" (italics added) (B. A. 156).

(d) "It is not true that any union organizer forced an election upon us. The fact is that originally the union organizers asked the Labor Board to certify the union as the collective bargaining agency. Our company insisted that each employee has a right to exercise his democratic privilege and to vote on the question as to whether he wanted this union or not. As a result of the hearing, the Labor Board ordered an election to be held on May 8, 1940, at which time we urge each and every one of our employees to go to the polls and vote" (B. A. 158).

Procedure.

On February 10, 1941, the Board issued its complaint in this cause, against Petitioners pursuant to an amended charge filed by the Union on January 7, 1941 (B. A. 43). On February 20, 1941, Petitioners filed a motion to dismiss the complaint, supported by a petition setting forth in substance: that the complaint should be dismissed on the ground of *res adjudicata* and laches in view of the Board's previous order and decision finding that the individual contracts did not constitute a bar to collective bargaining; that the question concerning representation of Petitioners' employees could best be resolved by a secret ballot; that a secret ballot had been held in which the employees voted overwhelmingly against the Union; that the Board had previously adjudicated and overruled all of the Union's objections to the conduct of the election; that the Union had previously made no complaint of any interference with the free choice of its members or of Petitioners' employees by virtue of either the speech of August 5, 1939, the individual contracts, or the letter of Petitioners to their

employees, although the Union had knowledge of the same for more than 17 months prior thereto (Rp. A. 101, 103, 104).

On February 26, 1941, said motion having been undisposed of, Petitioners filed their Answer in the Alternative, in the event of the denial of their Motion to Dismiss (B. A. 5, 10). At the beginning of the hearing on March 3, 1941, the Trial Examiner overruled the Motion to Dismiss (Rp. A. 1).

On July 31, 1941, the Board entered its Decision and Order, in substance sustaining the Trial Examiner's Report, to which Petitioners had filed appropriate exceptions and had argued said exceptions orally before the Board on June 5, 1941 (B. A. 43, 45).

On the 24th day of November, 1941 the Board filed a petition for enforcement of its order in the Circuit Court of Appeals for the Seventh Circuit.

On the 8th day of April, 1942, after denying Petitioners' petition for a rehearing on the 9th day of March, 1942, and after refusing to enter the form of decree presented by the Petitioners, the Circuit Court of Appeals entered its decree pursuant to its decision of February 17, 1942.

The decree enforced the order of the Board. The sections of the decree here complained of required that Petitioners:

> "(1) Cease and desist from:
>
> (a) Interrogating their employees as to their union affiliations or activities;
>
> (b) Giving effect to the individual contracts of employment or any modification, continuation, extension or renewal thereof, or entering into any similar form of contract with their employees for any period subsequent to the date of this decree."

The decree also provided for giving separate written notice to each employee who signed an individual contract regardless of the fact that said contract expired by its terms long prior to the entry of the decree; and ordered posting of notices despite the fact that the events complained of took place in 1939 whereas in 1941, at the time of the hearing before the Board, only 91 of Petitioners' then 201 employees had been employed by Petitioners in 1939.

ERRORS RELIED UPON.

(1) Petitioners assign as error the holding by the Circuit Court of Appeals for the Seventh Circuit: (a) that the Board has jurisdiction and power to prohibit an employer in perpetuity from entering into written individual contracts to take effect *in futuro*; (b) that an adjustment clause of an individual contract limited to adjustment of disputes arising under the individual contract is invalid *per se*, although the same clause would be valid in a collective bargaining contract; (c) that an employer does not have the right to express his opinion in a speech or letter to his employees on the subject of labor relations even though the statements made by the employer are true and the employer made no threats of economic reprisals and the letters to the employees were in response to union letters to the employees which "contained a rather scathing indictment of petitioners * * *" and which "went far beyond the bounds of truth and accuracy in describing petitioners' attitude toward the union"; (d) that an employer does not have the right to inquire of his employees if they are members of a union or desire to be represented by a union at a time when the union is claiming to represent the employees, and at a time when the Board has ordered an investigation into the question of the union's claims, and the Board has made the employer

a party to the investigation with the right and duty to meet, at that investigation, the issue of whether or not the complaining union has a substantial interest, and that the employer does not have such right at such time despite the fact that the union has refused to allow the employer to check the union membership cards for authenticity of signature; (e) that the Board is not bound by the doctrine of *res adjudicata.*

(2) Such holdings of the Circuit Court of Appeals are: (a) in conflict with the decisions of this Court; (b) violative of the First and Fourteenth Amendments of the Constitution of the United States; (c) are not the proper construction of the intention of Congress or the language used in Sections 7 and 8(1) of the National Labor Relations Act.

(3) The Circuit Court of Appeals erred in finding that the Board's order was supported by substantial evidence.

ARGUMENT.

I.

The Circuit Court of Appeals decree permanently enjoins petitioners from exercising their constitutional right of free speech.

Paragraph 1(a) of the Circuit Court of Appeals decree permanently enjoins petitioners from "interrogating their employees as to their union affiliations or activities."

Judge Major of the Circuit Court of Appeals, who wrote the decision in this case, did not sign the decree but instead noted upon the decree

> "I do not approve this decree. In my opinion paragraph 1(a) should be eliminated. * * *"

If the decree of the Circuit Court of Appeals is allowed to remain unchallenged, the right of petitioners or any employer to speak to their employees is muzzled.

Petitioners upon three occasions in the record exercised their right of free speech.

On the first occasion, petitioners' attorney spoke to all the employees to explain the National Labor Relations Act, and to attempt to halt the crescendo of disturbance in the plant during working hours and the resulting serious interference with production.

The Circuit Court of Appeals in its opinion recognizes the fact that there is no real conflict as to the contents of the speech, and that the employees

> "were given a rather accurate statement as to their rights under the Act."

The second occasion was seven months after the speech, when petitioners' attorneys, in order to ascertain certain

facts in preparation for the Board's representation hearing, asked the employees if they were members of the union and if they desired the union to represent them for the purpose of collective bargaining. The Circuit Court of Appeals recognizes the undisputed fact that

> "here again the employees were told of their rights under the Act."

The third occasion was ten months after the speech, when petitioners wrote a letter to their employees on May 3, 1940. This was after the union on April 24th and May 1, 1940, had written two letters to all of petitioners' employees, which union letters, in the words of the Circuit Court of Appeals

> "contained a rather scathing indictment of respondents' anti-union attitude * * * and went far beyond the bounds of truth and accuracy in describing respondents' attitude toward the union."

The Circuit Court of Appeals in its opinion also notes,

> "Of course, we assume that when respondents were assailed as they were by the union letters they naturally felt an urge to reply."

Nevertheless, the Circuit Court of Appeals, in its opinion and in its decree, chooses to rely upon the interviewing of employees and to enjoin such activity.

There is *no* evidence or even charge that any employee was ever interrogated about his union *activities*. The only question asked in regard to unions was that of whether or not the employee was a member of the union or desired the union to represent him.

It is submitted that with the protection that the Act gives to employees in their hire and tenure of employment, if anything, the Act presupposes knowledge on the part of the employers of their employees' union membership.

Interviewing of Employees.

Petitioners had been made party to a prior representation proceeding by the Board in which one of the issues was whether or not the union had a substantial interest among petitioners' employees so that the Board might determine if it should order an election. It was the right and the duty of petitioners to offer evidence upon this issue. Petitioners had requested the opportunity to check the union cards for authenticity of signatures and this opportunity was denied to petitioners by the union (Rp. A. 2, 81, 82, 95). Hence, petitioners had only one other alternative—that of asking the employees directly. If paragraph 1(a) of the decree of the Circuit Court of Appeals should be allowed to stand, petitioners would be denied their constitutional privilege to investigate the facts in order to adequately prepare to meet an issue of fact in a proceeding to which they are made parties.

It is submitted that there might be many instances in the future which might require petitioners to inquire of their employees relative to their union membership, particularly should some union demand a closed shop agreement from petitioners.

See *National Labor Relations Board* v. *Mason Manufacturing Co.* (CCA 9th) 126 F. (2) 810, which, in effect, requires that an employer know prior to entering into a closed shop agreement with any union, whether or not his employees belong to the union and whether or not they have delegated to the union the right to enter into a collective bargaining agreement containing a closed shop provision.

The decree and opinion of the Circuit Court of Appeals is in direct conflict with the decisions of this Court. In the case of *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, this Court stated at page 477:

"Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer, but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. * * * *If the total activities of an employer restrain or coerce his employees in* THEIR FREE CHOICE, *then those employees are entitled to the protection of the Act.*"

The Circuit Court of Appeals recognizes the undisputed fact that the free choice of all of petitioners' employees in reference to the speech, interview, and contract was at no time ever interfered with. The Circuit Court of Appeals' opinion states that the letter of May 3rd "we think interferes with the rights of the employees to have a free election". Nevertheless, the Board itself, when that precise question was in issue in the prior representation proceeding, overruled the union's objections to the election and found that the employees had voted in a duly constituted election, subsequent to the letter and had exercised their free choice and had not designated the union as their collective bargaining agent.

Petitioners respectfully submit that labor unions do not have the exclusive privilege or franchise to write letters to employees without at least giving the employer the opportunity to fairly and honestly answer charges made against the employer, especially where the employees, after receiving the union's hostile, false, letters have made inquiry of the employer's position (Rp. A. 78, 89, 91; B. A. 136).

The rule of this court set forth in the *Virginia Electric & Power Co.* case, namely, that "if the total activities of an employer restrain or coerce his employees in their *free*

choice, then these employees are entitled to the protection of the Act", is completely disregarded by the Circuit Court of Appeals in this case.

The Circuit Court of Appeals states in its opinion that:

> "Respondents make a rather plausible argument that the speech of August 5, 1939, the questioning of their employees, and the letter of May 3, 1940, are protected by the constitutional right of free speech. Reliance is placed upon the recent decision of *N.L.R.B.* v. *Virginia Electric & Power Company,* decided by the Supreme Court, December 22, 1941, which apparently supports such argument. We do not think it is necessary, however, to discuss or decide the validity of the Board's conclusion with reference to these separate incidents, because of the Board's general finding predicated upon the events as a whole. In such a situation, the rationale of the *Virginia Electric and Power Company* case, as we understand it, has no application. In other words, the Board, in the instant matter, predicated its findings upon the whole course of conduct which it failed to do in that case, and which was the reason assigned for reversal."

The Circuit Court of Appeals is in error in the application of this Court's decision in the *Virginia Electric and Power Company* case. The Circuit Court of Appeals said:

> "It is pointed out that the employees were at no time restrained from a free discussion of their union activities and that no employee was discriminated against, laid off or discharged because of union activity or membership.
>
> "Undoubtedly, such a situation is commendable and entitled to consideration in cases of some character, * * * In a situation such as here presented, however, *the background is of minor importance* for the reason

that the matters in controversy are dependent largely upon a *construction* of speeches, interviews and written documents."

In the *Virginia Electric* case, this Court said (314 U. S. 469 at 479):

> "If the utterances are thus to be *separated from their background*, we find it difficult to sustain a finding of coercion with respect to them alone."

It is apparent that the very premise of the Circuit Court's opinion (that background is of minor importance and that the speech, interviews, and letter should be separately construed isolated from their background) is in conflict with the view of this Court. The Circuit Court erred in disregarding the "commendable" background which is found to exist here. According to this Court, background is not only of major importance but *it is only when the acts in question are an integral part of a background of anti-unionism, discrimination and restraint that actions otherwise within the employer's constitutional prerogative, may even be considered.*

In the *Virginia Electric* case, this Court did not hold that a totality of otherwise legal acts, *alone*, could support a finding of violation of the law. On the contrary, this Court emphasized that acts which might otherwise be considered lawful in themselves were proper to be considered *only* when there exists a wrongful background such as was present in the *Virginia Electric* case and *not* present in the case at bar. As this Court said (314 U. S. 469 at 477-478):

> "If the Board's ultimate conclusion is based upon a complex of activities, such as the anti-union background of the Company, the activities of Bishop, Edwards' warning to the employees that they would

> be discharged for 'messing with the C.I.O.,' the discharge of Mann, the quick formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the *Company said* in conjunction with what *it did.*"

The opening sentence of this Court's opinion in that case indicates our point. In that opening sentence, this Court said (314 U. S. 469 at 470):

> "For years prior to the events in this case, the Virginia Electric & Power Company was hostile to labor organizations."

(The Circuit Court has recognized that the background in the case at bar is exactly the reverse of what existed there.)

In the *Virginia Electric* case, the Board's conclusion that unfair labor practices were engaged in, was predicated upon the following finding of the Board: *"Upon the basis of these findings and the entire record in the case."* (p. 475). Exactly the same language was used by the Board in the case at bar (B. A. 63). Despite the fact that the Board's finding in the *Virginia Electric* case is in the identical words of the Board's finding here, upon which the Circuit Court relied to distinguish the two cases, nevertheless the Circuit Court said in its opinion:

> "In other words, the Board, in the instant matter, predicated its findings upon the whole course of conduct which *it failed to do in that case*, and which was the reason assigned for reversal."

Here, therefore, the Circuit Court is in complete error since in *both* cases the Board made the identical general finding.

To clarify this point and show that the Circuit Court of Appeals was under a misapprehension, we submit below in parallel columns: (1) the Board's findings in the case at bar; (2) the Board's finding as described by this Court in the *Virginia Electric* case.

(1)	(2)
In the Case at Bar	In the Supreme Court Case
"The Board therefore finds, as did the Trial Examiner, that by the speech made by Jacobson to the employees at the plant meeting of August 5, 1939, and the proceedings at said meeting; by causing their employees to sign individual contracts in 1939, 1940 and 1941; by questioning their employees concerning their union affiliation in March, 1940; and by sending to their employees the letter of May 3, 1940, the respondents have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act" (B. A. 62).	"The Board specifically found that the bulletin of April 26 and the speeches of May 24 'interfered with, restrained and coerced' the Company's employees in the exercise of their rights guaranteed by section 7 of the Act." (p. 476-7). "It is clear that the Board specifically found that those utterances were unfair labor practices, * * *" (p. 479).
"Upon the basis of the above findings of fact and upon the entire record in the proceeding, the Board makes the following" (B. A. 63):	"Upon the basis of these findings and the entire record in the case the Board concluded that * * *" (p. 475).

In the case at bar there is involved a specific injunction and finding that the petitioners' exercise of their con-

stitutional right of free speech, standing alone, is an unfair labor practice—directly contrary to this Court's decision in the *Virginia Electric* case.

While there was present in the *Virginia Electric* case the identical language which the Circuit Court relies on to enforce the Board's order here and to distinguish the two cases, this Court refused to rely on such language and refused to affirm the Board's order in the *Virginia Electric* case.

The Board in the case at bar did not make any finding of a *"Plan"* any more than the Board did in the *Virginia Electric* case. The word *"Plan"* was mentioned for the first time in the Board's brief before the Circuit Court. The Court therefore devoted a great part of its opinion to consider the question of substantial evidence to support a *non-existent* finding by the Board, *i. e.,* that there was a *"Plan."*

Thus the Circuit Court of Appeals has misinterpreted and erroneously applied this Court's decision in the *Virginia Electric* case.

Conflict with Other Circuits.

The opinion is also in direct conflict with the case of *National Labor Relations Board* v. *Ford Motor Co.,* 114 F. (2) 905 (CCA 6), and the decisions of this Court (*Cantwell* v. *State of Connecticut,* 310 U. S. 296, and *Thornhill* v. *Alabama,* 310 U. S. 88) therein referred to. The Sixth Circuit decided this question and reached the *opposite* conclusion to the Seventh Circuit. The decision contains such a succinct discussion of the issue that it does not seem inappropriate to quote it somewhat fully. The Sixth Circuit said, at page 913:

> "If the concept that an employer's opinion of labor organizations and organizers must, because of the

authority of master over servant, nearly always prove coercive, ever had validity, it is difficult now to say, in view of the National Labor Relations Act, its adjudication as constitutionally valid, its strict enforcement by the National Labor Relations Board, and the liberal attitude of the courts in construing it so as best to effectuate its great social and economic purpose, that the concept is still a sound one. The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied.

"By that token, *freedom of speech guaranteed without exception to all, is the more fundamental right here involved. 'Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.'* Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319, 327. Without it the very right which the Board seeks to protect by its cease and desist order, the right to organize, to seek converts to unionism and collective bargaining, itself would be of little value.

"As the Supreme Court has recently said in *Thornhill* v. *Alabama*, 310 U. S. 88, 102: 'In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.' Citing *Hague* v. *C. I. O.*, 307 U. S., 496; *Schneider* v. *State of New Jersey, supra.*"

Conflict with Congressional Intent.

During the hearings by the Senate Committee on Education and Labor, prior to the passage of the Act, Chairman Walsh stated:

> "I do not think there is anything in this bill to prevent an employer *when his employees * * * are about to organize,* from posting a notice, or writing each an individual letter, or personally stating to each that he thinks their best interest is to form a company union, that (he) is violently opposed to so-and-so who is attempting to organize a union." S. 1958, 74th Cong., 1st Sess., at 305 (1935).

Senator Walsh stated that the Senate Committee had stricken the word "influence" from the bill in order to permit an employer to tell his employees that it would be to their best interests to form a company union, or that he was opposed to a particular union organizer. (Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., at 305 (1935).) The fact that the employer presents the reasons for his conclusions would not make the statement coercive; in fact, it would remove any strain of coercion that might be regarded as being present in the bare expression of a conclusion.

During the course of the debates on the floor of the Senate, it is noteworthy that Senator Walsh stated: "An employee, like an employer, of course, has the right to discuss the merits of any organization. Indeed, Congress could not constitutionally pass a law abridging the freedom of speech. * * * *The bill now under consideration does not enter into those realms of free speech.* * *" 79 Cong. Rec. 7661 (1935).

So also in the case of *Humble Oil & Refining Co.* v. *National Labor Relations Board,* 113 F. (2) 85 (CCA 5), the

Court did not agree (even in a company dominated union situation) with the findings of the Board attempting to limit the right of free speech of the employer. The Court said at page 89:

> "We do not think that the law, any more than common sense, *would require the employer to stand as a sheep before his shearers dumb, not opening his mouth.* The right of free speech touching his own interests was involved."

II.

An adjustment clause in an individual contract of employment is not illegal per se.

The Circuit Court of Appeals in striking down the individual contract involved herein, in effect did so because of the Court's ruling as a matter of law that the Adjustment Clause was illegal *per se.*

At page 19 we have set forth the Adjustment Clause.

The Trial Examiner stated:

> "I think the Board will construe these contracts * * * independently of what any individual employee thinks, his reaction to it or what influenced him to sign it * * *." (Rp. A. 46).

The Board's Trial Attorney:

> "* * * the validity of these contracts is, more or less, a matter of law * * *" (Rp. A. 25).

The Board in its opinion stated:

> "A number of employees testified that they understood that they could sign these individual contracts

of employment and still retain their membership in the union. This testimony does not alter our conclusion as stated above'' (B. A. 52).

At pages 15 to 20 hereof we have set forth the uncontradicted and undisputed evidence relative to the individual contract and the adjustment clause, which discloses that: (a) the employees had a complete understanding of their free choice; (b) the employees exercised their free choice; (c) the individual contracts did not interfere with the employees' union activity; (d) the Board specifically found in the prior representation proceeding that the contracts containing the adjustment clause were not a bar to collective bargaining; (e) the individual contracts were never asserted as a bar to collective bargaining or to any relief by the National Labor Relations Board; (f) the employees understood the individual contract with the adjustment clause was not a substitute for a union agreement; (g) employees belonged to the union and accepted the adjustment clause; (h) no employee was ever discriminated against who did not accept an individual contract; (i) a majority of the employees accepted the individual contract *without* the adjustment clause.

The Circuit Court of Appeals and the Board cast aside all the witnesses' testimony, including the Board's witnesses, in reference to the actual operation of the adjustment clause and the employees' understanding thereof.

This is in direct conflict with the decisions of this Court holding that consideration must be given to the understanding of the parties to a contract and their action demonstrating this understanding in determining the true legal effect of any particular clause in a contract. *Bank of British, N.A.* v. *Cooper*, 137 U. S. 473, 477; Williston on Contracts, Sec. 618; Restatement of Law of Contract, Sections 235 (d), 236.

Such legal construction by the Board and the Circuit Court of Appeals is also in direct conflict with the long established doctrine of this Court in *Brick* v. *Brick,* 98 U. S. 514, that if the understanding and construction placed by the parties to a contract upon a clause in the contract does not support an asserted legal conclusion respecting the effect and meaning of that clause, then the clause cannot be held to have such a meaning or effect.

The construction placed upon the adjustment clause by the parties as well as the union, the operation of the clause, and the understanding of the parties as shown by the subsequent events and uncontradicted facts, clearly disclose the absence of any interference by the adjustment clause with collective bargaining rights of the employees or the Union, under the Act.

While the Circuit Court in its opinion states that the employee "bound" himself to submit any differences to arbitration, and that the employee "was obligated to bargain individually", such a construction is just not in accordance with the facts. Similarly, the Circuit Court's conclusion that by virtue of the adjustment clause the employee gave up his right to strike and waived his right to collective bargaining, is in direct conflict with the positive testimony of all the witnesses, including all the Board's witnesses, as to their understanding and the operation of the adjustment clause (Rp. A. 10, 11, 14, 17, 20, 23, 31, 38, 64, 65, 44, 45, 49, 52, 55, 70, 71, 9, 104, 75, 60, 102, 111, 7, 16, 19, 24, 26, 29, 40, 43, 58, 59, 60, 63, 90, 91, 105, 106, 107; Respondents' Exhibits 3, 6, 7, 8; B.A. 159, 160, 161).

The Circuit Court relies on the words of the preamble of the individual contract, "to prevent strikes and labor troubles." Such fallacious reasoning would lead to the conclusion that since Section 1 of the National Labor Re-

lations Act states as the Act's purpose that strikes and industrial strife or unrest should be prevented, that, therefore, the National Labor Relations Act forces an employee to give up his right to collective bargaining or to strike.

There is nothing in the adjustment clause, express or implied from which it can be said by any stretch of the imagination that any employee gave up his right to collective bargaining or his right to strike. If an employee who signed such an individual contract containing such an adjustment clause subsequently joined a union, in what conceivable way could the employer assert this adjustment clause as a bar to collective bargaining by the union on behalf of that employee? In what conceivable way could the employer assert the adjustment clause as a bar to the employee going on strike, or as a bar to any of the rights guaranteed by the National Labor Relations Act?

The obvious answer is that the employer could not, and, in this case, the employer never attempted to set up the adjustment clause as a bar to any employee's rights under the Act. Nor could this clause have had any such effect in the minds of the employees themselves, since all of them testified that their understanding was that the clause in no way restricted them in their union activities or in the exercise of their rights under the Act. No employee abandoned the union; 17 months *after* the contract offer the union claimed to represent a majority (Rp. A. 108).

Practically every union contract contains an arbitration clause of a similar nature. *Cf. National Labor Relations Board* v. *Columbian Enameling and Stamping Co.*, 96 F. (2) 948 (CCA 7). Unions find no difficulty in representing themselves thereunder or in appointing third party disinterested arbitrators.

There is no doubt that even in any "closed shop" an employee *first* does and would make *"an attempt at settlement of the dispute by direct dealing"* with his employer before going to his union or the Board.

Typical union contracts almost invariably provide as the first step in the Grievance Procedure that the employee shall in the first instance present his grievance to his foreman in an effort to adjust it, before resorting to any of the next succeeding steps. See CIO union agreement with General Motors Corporation, Par. 28, CCH Labor Law Service, page 615; CIO union agreement with Carnegie-Illinois Steel Corporation, Sec. 7, CCH Labor Law Service, page 637; CIO-Ford Motor Co. union agreement, par. 24, CCH Labor Law Service, page 690.

The Circuit Court's opinion is in conflict with other Circuit Courts of Appeals. See *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2) 153, 164 (CCA 9) and *National Labor Relations Board* v. *Delaware, New Jersey Ferry Co.*, 90 F. (2) 920 (CCA 3).

Neither the contracts nor the adjustment clause, by their terms, could erect any barrier to the rights of employees under the Act. The contracts *were terminable* at any time on one week's notice by the *employee*. There was no influence or coercion on the part of petitioners as to whom to designate or even as to whether or not to fill in the blank at all (Rp. A. 14, 11, 20, 9, 10, 17, 31, 55, 64, 70, 71).

The adjustment clause merely codifies what every fair minded employer will try to do in the first instance—"adjust with the employee all disputes, by negotiation, if possible."

The Circuit Court's conclusion that the individual contract, because of the adjustment clause, violates the Act *per se* is directly contrary to this Court's decision in

National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350, wherein this Court struck down a purported individual contract, which contract contained provisions expressly forbidden by the Act, namely, (a) benefits of the contract were limited only to signers; (b) signers relinquished the right to strike, and (c) the right to demand a closed shop, and (d) the right to demand a signed agreement with any union, and (e) the right to mediate or arbitrate the propriety of a discharge. The contracts in the *National Licorice* case were not individual contracts at all, but were contracts negotiated with a company dominated union. There are no such facts in the case at bar.

The arbitration clause is **optional** with the employee to adjust any dispute himself or select an arbitrator. No "prohibitive" construction was placed upon the clause by the parties. It was never asserted as a bar to the Board's complaint in this case. It is not a *must* or *prohibitive* clause. On the contrary, the clause is one for the employees' benefit—not the employer's. The clause involved in the case of *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, was entirely different. This Court did not strike down that clause because it was an arbitration clause but because it *expressly excluded any arbitration* in the event of discharge, *or review* by the Board as to discriminatory discharge or negotiations by any labor union. In other words, it gave the employer the absolute right to discharge while the Act limits this right. Hence that clause violated the Act.

The Circuit Court of Appeals for the Ninth Circuit has so construed the *National Licorice* case. In *National Labor Relations Board* v. *Sterling Motors, Inc.*, 112 F. (2) 63 (CCA 9), the Court at page 68 said:

> "The Board cites as determining the congressional intent to create the absolute power claimed here, the

case of *National Labor Relations Board* v. *National Licorice Co.*, ... U. S. ....., 84 L. Ed. 533. The report of that case shows no counsel representing the employees or the union. As we read the opinion the petition for certiorari raised no question of the disestablishment of the union. *The case involves the individual contracts of employees with the employer which on their face showed agreements in violation of the Act.*"

This legal conclusion of the Circuit Court of Appeals is also in conflict with other decisions of this Court. This Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, was called upon to consider the constitutionality of the National Labor Relations Act. In answer to the contention that the Act was unconstitutional because it interfered with the right of individual contract, this Court said, at page 45:

"It was taken 'to prohibit the negotiation of (collective) labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, '*but not as precluding such individual contracts*' *as the Company might* '*elect to make directly with individual employees.*' We think this construction also applies to Section 9(a) of the National Labor Relations Act.

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. *It does not prevent the employer* 'from refusing to make a collective contract and *hiring individuals on whatever terms*' *the employer* '*may by unilateral action determine.*' The Act expressly provides in Section 9 (a) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

There hardly seems room for any doubt of this Court's admonition that Congress *did not* and *could not* have delegated any authority to the Board to interfere with individual contracts entered into without coercion. In considering this precise question, it has been said: "Close analysis of the Court's decision (*Jones and Laughlin* case) seems to indicate * * * that the Court was speaking of exactly that situation, and the Court certainly seems to hold that individual bargaining is an alternative. The Board's best, indeed, the Board's only argument, therefore must ignore the Supreme Court's pronouncement * * * *the policy of almost any statute could be more conveniently attained by ignoring the limitations imposed by the due process clause.*" Chester Ward, "*The Mechanics of Collective Bargaining,*" 53 Harvard Law Review, 754, 790, (March 1940).

The right of an employer to enter into individual contracts is just as fundamental and entitled to the same respect as the obligation of employers to recognize either national labor organizations or independent unions representing a majority of its employees and to collectively bargain.

The legal conclusion of the Circuit Court of Appeals in the case at bar is in conflict with other Circuit Courts of Appeals. In *National Labor Relations Board* v. *Sterling Electric Motors, Inc.*, 109 F. (2) 194 (CCA 9) the Court considered this question. The Court having previously referred to (a) dealing with international unions and (b) independent "inside" unions, then said at page 202:

> "The third *alternative* for the small plant seems almost ignored in the titanic struggle for power of nation-wide internationals and associations, though the right to choose it is as worthy of the consideration of courts and legislatures as either of the other two.

That is the right not to join or create or assist any labor organization at all but to deal individually with the employee. * * *

"In a proceeding seeking to destroy a labor organization, we do not interpret the intent of Congress in enacting the Labor Board legislation to have established any presumption that employees are always to be deemed to be aiding a violation of the Act if they prefer no organization and decline to create one.

"Each of these three rights is of equal value and in administering the National Labor Relations Act is entitled to the protection of the Board."

It is significant to note as already heretofore pointed out at page 40, that the word "influence" was purposely excluded from Sec. 8(1) of the National Labor Relations Act. *H. Rep. 1147, 74th Cong. 1st Sess.* (1935); S. Rep. 573, 74th Cong., 1st Sess. (1935).

It is apparent that Congress in using the words "interfere", "restrain" or "coerce" (with the right to collectively bargain) must have meant such words in their normal meaning, rather than in the sense of "influence" which might be prohibitive of the right of individual contract or expression of opinion, as the Circuit Court of Appeals in this case has chosen to interpret the meaning of Section 8(1).

The decision of the Circuit Court of Appeals for the Seventh Circuit in the case at bar is also in conflict with decisions of the Third, Fifth and Ninth Circuit Courts of Appeals.

In *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2) 153 (CCA 9), the Court said at page 164:

"The above quoted finding indicates that the Board followed the position asserted by the Attorney for the

Union to the effect that an employer under the circumstances was deprived of any right to make any settlement of a grievance directly with an employee.

"This was not a correct interpretation either of the agreement or the law.

"Section 9 (a) of the Act contains the proviso that 'any individual employee or group of employees shall have the right at any time to present grievances to their employers.' Thus the Act does not inhibit the adjustment of individual grievances directly between employee and employer and such procedure is entirely consistent with collective bargaining in matters affecting employees as a class. This view finds support in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1."

See also *P. & O. Steamship Co.* v. *National Labor Relations Board,* 98 F. (2) 411 (CCA 5) and *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 90 F. (2) 520 (CCA 3).

Instead of being criticized and subjected to great expense and harassment by the Board, an employer should be commended for being willing to reduce to written terms its employment relationship with its individual employees. See *Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514.

III.

A perpetual injunction against an employer executing individual contracts deprives the employer and his present and future employees of their constitutional rights.

The decree of the Circuit Court of Appeals prohibits "any modification, continuation, extension or renewal thereof or entering into any similar form of contract for any period subsequent to the date of this decree." These words are so broad and general that, it is respectfully submitted, they are not only confusing and indefinite, and leave petitioners' future required action uncertain; but also deprive petitioners and their employees of their constitutional right to contract.

Even in those instances where the Board has the express right to exercise its jurisdiction over collective bargaining contracts no court ever prohibited any employer from at any time in the future negotiating any closed shop agreement.

The decree attempts to engage in speculation entirely outside of, and unwarranted by the record as to what happened, or did not happen, or may happen subsequent to December 31, 1941.

In effect, the perpetual injunction in this case is no different from the previous censorship of the exercise of the right of free speech condemned as a violation of the Fourteenth Amendment by this Court in *Schneider* v. *State*, 308 U. S. 147, and in *Patterson* v. *Colorado*, 205 U. S. 454, where this Court said, at page 462:

> "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."

This statement was repeated with approval in *Near* v. *State of Minnesota*, 283 U. S. 697, 714.

IV.

The Board's order is not supported by substantial evidence.

It is hardly necessary to point out that in determining the question of substantial evidence, this Court will consider the "whole congeries of facts" (*National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584), or the "web of other circumstances" (*National Labor Relations Board* v. *Swank Products, Inc.*, 108 F. (2d) 872 (CCA 3).) Such a consideration of the record as a whole will convincingly demonstrate that there has been no interference, restraint or coercion of any employee. On the contrary, the "whole congeries of facts" unequivocally demonstrates that the employees, as American citizens, were given all the facts, and, fully cognizant of their rights and privileges and without any intimidation, fear or coercion, exercised their democratic privilege of free choice.

This present controversy ignores the rights of the employees themselves and rejects their own freely exercised choice as demonstrated by the election in which they voted *emphatically* against the Union.

The free choice of petitioners' employees reflected in the election wherein the Union only received 59 of a possible 173 votes, has been disregarded—in spite of the Board's own prior decision to the contrary, and the testimony of even the Board's own witnesses, all to the contrary (Resp. Ex. 9, Rp. A. 113, 114).

There is no dispute of the evidence that at the time of the election petitioners had informed their employees on at least three occasions, August 5, 1939, March, 1940 and May 3, 1940, that the company would recognize any union if a majority of the employees wanted the union; that the

employees could join any union they wanted; that the company had no objections to unions, and that the company was neutral (Rp. A. 8, 13, 20, 29, 37, 38, 15, 69, 91, 92, 94, 32, 48, 52, 16, 35, 64, 88, 14, 17, 30, 11, 34, 70, 71; B. A. 76, 156).

It is odd that the Union at the time of filing its objections to the election on June 12, 1940, did not complain: that the speech of August 5, 1939; that the individual contract of 1939 and 1940; that the interviewing of employees in March, 1940; or that the letter to employees of May 3, 1940, constituted grounds for objections to the election, or interfered, restrained or coerced petitioners' employees' free choice at the time of the election (B. A. 45).

The Trial Examiner found "although the evidence is insufficient to warrant a finding that the employees were specifically coerced into signing contracts, the *circumstances* under which they were submitted were in themselves coercive" (B. A. 18).

The Board's Opinion concludes that the *circumstances* were coercive because they "had the purpose of *persuading* them that it was unnecessary to join or remain a member of the Union in order to obtain the benefits that normally result from collective bargaining" (B. A. 52).

While it is submitted that "persuading" employees that there might be *other* methods (without any threats or coercion) of obtaining "the benefits that normally result from collective bargaining" is not an unfair labor practice as a matter of law, nevertheless, upon the uncontradicted testimony of the Board's own witnesses, as well as petitioners' witnesses, there was no such persuasion.

Thus the opinion of the Circuit Court in this case is contrary to the decisions of other Circuit Courts of Appeals in *National Labor Relations Board* v. *Automotive Mainte-*

nance Co., 116 F. (2) 350, 355, 356 (CCA 7); *E. I. du Pont de Nemours* v. *National Labor Relations Board*, 116 F. (2) 388, 398, (CCA 4); *National Labor Relations Board* v. *The A. S. Abell Co.*, 97 F. (2) 951, 957 (CCA 4); *Magnolia Petroleum Co.* v. *National Labor Relations Board*, 115 F. (2) 1007, 1011, 1012 (CCA 10); *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 98 F. (2) 870, 871 (CCA 5).

The Circuit Court of Appeals and the Board also fail to consider the fact that the employees were intelligent human beings and at all times understood their rights. It was stipulated that the individual contracts improved working conditions, wages and hours of employment but were not offered as a term or condition of employment (Rp. A. 56, 57, 58, 75). At pages 12 to 26 in this brief, we have set forth the undisputed evidence proving an unhampered and intelligently exercised freedom of choice on the part of the employees.

CONCLUSION.

This petition in no way seeks to interfere with the right to collective bargaining or union recognition or to forestall the stated purposes of the Act in "impairing the efficiency, safety or operation of the instrumentalities of commerce * * * or causing diminution of employment and wages." The denial of the Constitutional guarantees of freedom of individual contract and freedom of speech would suppress, rather than encourage, such stated policy.

Respectfully submitted,

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